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In the
Supreme Court of the United States

OCTOBER TERM, 1948

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner*.

PETITION OF SAM MACRI, DON MACRI AND JOE MACRI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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THE ARGUS PRESS, SEATTLE

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No. .....

PETITION OF SAM MACRI, DON MACRI AND JOE MACRI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on February 11, 1949 (R. 2274), after denial of petition for rehearing on April 5, 1949 (R. 2275), affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division (R. 112).

STATEMENT OF THE CASE

The United States Court of Appeals for the Ninth Circuit in this statutory federal proceeding under the *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) has declared, as pertaining to the petitioners Macri, that "* * * we should decide this issue as would a state court in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable * * *" (R. 2267). The Court of Appeals then decided one important question of local law, *i.e.*, the correct basis for compensation for breach of subcontract, contrary to the controlling Washington decisions. It made no decision on another important question of local law, squarely before it (R. 140), *i.e.*, the use plaintiff's disqualification under state law and state authorities to prosecute the action.

It attributed to these petitioners Macri reliance on one of such court's own former opinions (R. 2269), although that case was neither cited nor argued by petitioners at hearing or by any adverse parties. The Court of Appeals used a major portion of its opinion on the issue affecting petitioners Macri, in distinguishing such court's own former case (R. 2269-70). It did not discuss, cite or distinguish, but wholly ignored, and cited no similar case of final authority in lieu of, the case of *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L.ed. 938, upon which petitioners Macri did principally rely as the applicable decision of this Supreme Court of the United States. The Court of Appeals thereby has also decided a federal question

in a way which is in conflict with the applicable decisions of the Supreme Court of the United States.

The trial court gave judgment for the use plaintiff Schaefer (R. 113) and *unconditionally, instead of conditionally* gave judgment for the same amount, plus attorneys' fees, to Macri's surety, the petitioner Continental Casualty Company (R. 114). The Court of Appeals failed to correct so as to protect petitioners Macri from double liability of amount fixed by the trial court (R. 2266-7). This was done in spite of the surety's statement in its reply brief in that court that "Continental now states and makes a matter of record that it has never had and does not now have any objection to its judgment over against the cross appellants being either construed or amended as conditional on the non-payment of the judgment by them" (Cont. Reply Brief, Ct. App., p. 1; Appellate Court Cause No. 11707).

The action in question was brought by the United States for the use of M. C. Schaefer, dba Concrete Construction Company (hereinafter referred to as Schaefer), against Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, the principal contractors on the public work in question (hereinafter called Macri), Macri's surety, Continental Casualty Company (hereinafter called Continental), and Macri's joint adventurers for the public work in question, A. J. Goerig and Clyde Philp. Schaefer sued for $57,618.87 damages for alleged breach of his subcontract by Macri.

At the conclusion of a protracted non-jury trial the district court rendered a lengthly oral decision,

made findings, denied defendants' motions for judgment and for new trial, gave Schaefer judgment for $56,764.97, plus 6% interest from May 1, 1947, and $921.70 costs against Macri and Continental, only $853.90 less principal than the total sued for by Schaefer (R. 12, 94, 112-113, 115-117, 2208-30). The court carried the same judgment against Macri, plus $1750.00 attorneys' fees, unconditionally in favor of Continental, as Macri's surety (R. 114). Macri and Continental appealed to the Court of Appeals for the Ninth Circuit (R. 136, 118), which affirmed the district court judgment (R. 2273).

The Schaefer judgment figure of $56,764.97 was arrived at by taking the $89,498.71 summary of Schaefer's alleged total job cost (without admitting his books and accounts as sought by petitioners Macri R. 2202), and deducting therefrom only the $32,614.66 paid in current estimates by Macri to Schaefer (R. 78, 104, 1241-2, 1252-1264). There were erroneously included in such $89,498.71 items of 20% overhead, amounting to $13,582.82 (R. 1258), and 10% profit, amounting to $8,203.05 (R. 1261), and included in the net $56,764.97 judgment figure.

The Court of Appeals did not correct this manifest duplication of such 20% overhead and 10% profit on the $32,614.66 paid by estimates accepted by Shaefer throughout job progress (Pltf. Ex. 63; R. 1241-2, 1252-1264, 2270). All this was allowed to stand, despite an admitted 14.5% overrun of concrete by Schaefer (R. 1512) through admittedly unskillful subcontract operations therein (R. 1205, 1207). The judgment amount of $56,764.97 was more than 7½

times the total government payments of $7,694.13 for performance of all correlated items to the two bid items in the Schaefer subcontract. Such net judgment was $32,770.43 more than the total paid by the government for both the Schaefer two subcontract items and all of the correlated items. *Yet Macri, and not Schaefer, performed all such correlated items.*

The *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) was used as the vehicle for suit by Schaefer, suing as a sole trader dba Concrete Construction Company, without his having complied with the Washington law requiring proof of filing of certificate of assumed trade name as a prerequisite for any suit (Rem. Rev. Stat., Sec. 9980). Schaefer sued as a subcontractor under a subcontract in name of Concrete Construction Company, as an assumed trade name, in the Federal Court for the Eastern District of Washington, Southern Division. The objection to his being disqualified as a plaintiff was raised in a timely manner by petitioners Macri in both the district court (R. 2205) and in the Court of Appeals (R. 140), but it was waived aside without comment by either court (R. 94-115, 2264-2273).

Schaefer fully performed his subcontract and petitioners Macri fully performed their principal contract on the government work in question. No additional work or materials to those called for by the principal contract went into the public work. *Schaefer did not sue for any additional items of work or materials.* Instead, he claimed for alleged breach of his contract by Macri. He sued on a *quantum meruit* theory for alleged reasonable value of services per-

formed. He actually prosecuted a damage suit, not in the state court where it belonged, but in the federal district court, with the *Miller Act* (U.S.C.A., Title 40, sec. 270a, 270b; 49 Stat. 793, 794) as his only entree. Lack of jurisdiction so to do was submitted to but passed by the Court of Appeals without comment thereon (R. 2264-2273; Macri Opening Brief Ct. of App., pp. 1, 61; Macri Reply Brief, p. 1).

Macri had executed a principal contract on December 7, 1943, with the United States for a federal irrigation construction project, designated as a portion of the Roza Division, Yakima Project, near Yakima, Washington, for a total contract price on unit bids of $128,550.95 (Pltf. Ex. 1; R. 96, 158, 172). The Continental executed with Macri the requisite statutory "payment bond" in the penal sum of $64,275.48 (Continental Ex. 10). Goerig and Philp had signed a joint venture agreement to provide for distribution of profits or assumption of losses (Macri Ex. 7).

Macri signed with Schaefer on March 14, 1944, a subcontract calling for Schaefer to perform only 2 of the 26 items bid upon in the principal contract. Schaefer agreed thereby to do only the concrete work, for an agreed price of $26 per cubic yard of concrete placed. The public work consisted of laterals and sublaterals to the main canal, with boxes for diversion of water therefrom. Schaefer's subcontract pertained only to the installation of these concrete boxes (Pltf. Ex. 5; R. 99, 158, 175). Macri was to do the excavation work and furnish the lumber for the concrete forms, the government furnished the cement, and the concrete work was to be done by Schaefer.

The Schaefer subcontract (Pltf. Ex. 5) in coordination with a similar provision in the Macri principal specifications (Pltf. Ex. 2) provides for a definite notice of any claim of neglect or default. That is found in paragraph 5 of such subcontract, and reads:

> "If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, * * * the Subcontractor shall give the Principal Contractor notice in writing within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay."

Schaefer did not give Macri any such written notice, or any notice consonant with such paragraph 5 of the subcontract. The trial court found only that Schaefer made oral complaints to Macri, which were disregarded (R. 100-103). *Admittedly, however, Schaefer did not rescind the subcontract. Instead, he completed performance thereof.*

The concrete placed by Schaefer, based on the government's final yardage figures, amounted, at the bid price of $26.00 per yard in place, to the sum of $35,-271.12. Macri had paid Schaefer $32,614.66 thereof prior to suit. That is stipulated by pretrial order (R. 78, 104). That left only $2,656.46 as an unpaid balance of the Schaefer subcontract price (R. 124). That balance was, in any event, distrained by United States Internal Revenue Service notice of levy on any money due Schaefer (R. 105, Macri Ex. 67).

Schaefer's evidence, although disputed by both Reclamation Bureau officers and other competent testimony, was adopted by the district court to find that

Macri breached the subcontract in three particulars: In excavations to accomodate the Schaefer subcontracted irrigation boxes, with delay to Schaefer's carpenters; improperly dressing the excavations in time for Schaefer to proceed with his subcontracted work; and in failing to furnish adequate quality and quantity of lumber as required by Schaefer for the concrete forms.

Schaefer's case and judgment accordingly must actually be based on the following two propositions or fail: (1) For compensation for doing what was not included in the subcontracted concrete work, such as excavation and fine grading in any manner inadequate for the concrete forms; and (2) additional costs actually incurred by Schaefer in performing the subcontracted work by reason of Macri not having proper excavation or earthwork, with fine grading currently ready, and not furnishing form lumber of suitable quality as required, etc.

Schaefer made no attempt to segregate the amount of his claim under the above categories. He claimed that from day to day his men were spending a large amount of their time performing work which Macri should have done, but he kept no track thereof (R. 2154-5-6, 406).

Schaefer did not even make up his payrolls for the government until seven months' time for his contract performance had passed (R. 1373). *He admitted that there was no segregation of costs of performing the subcontracted work and of the claimed additional costs from Macri's alleged breaches or of costs for anything*

he may have done which was not under the subcontract (R. 2154-5, 949, 953, 1298-9, 1368, 1373).

Schaefer's two expert witnesses admitted that the reasonable value of Schaefer's performance would have been his subcontract price, except for Macri's partial breaches of the subcontract (R. 958, 960, 962, 1163).

Petitioners Macri submit that Schaefer's claims constitute damages for breach of contract by Macri and can be nothing else. None of Schaefer's claims is for work required or contemplated to be done by Schaefer under the subcontract. They are claims outside the subcontract instead of for any performance thereunder.

The opinion of the Court of Appeals rests heavily, but without actual foundation, on Macri's "accepting and acting on the oral notices" of Schaefer (R. 2269). The district court, *to the contrary*, denied recovery on Schaefer's claimed substitute express oral contract to pay costs, as alleged in Schaefer's first cause of action (R. 2-10), and rested its judgment on his second cause of action, based strictly on *quantum meruit* (R. 10-12).

The trial court stated, with respect to the above, as follows:

> "In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of

lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. * * *" (R. 2213)

"*However, the court cannot find under the record here that there was a meeting of the minds, or an express contract* that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. *I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him.* He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.* * * *" (R. 2214-5) (Italics ours)

The Court of Appeals has manifestly erred in holding that there was any contract, oral or otherwise, subsequent to Schaefer's subcontract. As the trial court pointed out, Schaefer repeatedly stated that he refused absolutely to do any other work than what his subcontract called for, and he continuously complained about Macri's partial breaches of that subcontract.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction to review the opinion and judgment of the Court of Appeals for the Ninth Circuit in this case by virtue of the U. S. Code, Title 28, Sec. 1254, par. 1.

The opinion and judgment of the Court of Appeals was filed February 11, 1949 (R. 2273, 2274). Macri's petition for rehearing was denied April 5, 1949 (R. 2275).

This petition is filed in a timely manner pursuant to U. S. Code, Title 28, Sec. 2101, par. (c) and (e). The Chief Judge of the Court of Appeals for the Ninth Circuit on April 5, 1949, entered an order staying issuance of mandate pending timely filing of petition for certiorari in this United States Supreme Court under Rule 38, par. 5 (b) of this Court.

QUESTIONS PRESENTED

The principal questions, on each of which the district court held in the affirmative and the Court of Appeals sustained such holding, are:

1. Where the subcontractor Schaefer completely performed his written subcontract on the federal public works job, without written or oral modification thereof, in spite of claimed repeated partial breaches thereof by Macri, as principal contractor, so as to render Schaefer's performance more costly because of delays, and where Schaefer was paid and without protest accepted all payments at the contract rate for his subcontract performance, should Schaefer not be

legally barred from recovery of his alleged total costs of performance, including 20% overhead and 10% profit on the whole subcontract job, on a basis of either implied contract or *quasi* contract?

2. Can Schaefer legally recover on any basis without having proved his additional costs of performing the subcontract by reason of any breach by the principal contractor or without complying with the provision of the subcontract regarding delays, or without having made any attempt to minimize his claimed increased costs?

3 Was not failure of Schaefer to comply with Secs. 9976-9980 of Rem. Rev. Stat., as a prerequisite to suit on a subcontract in an assumed name, a bar to his recovery?

4. Is the amount of recovery sufficiently supported by competent evidence?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

Petitioners Macri rely on the following reasons for allowance of the writ of certiorari herein, pursuant to par. 5(b) of Rule 38 of this Court:

1. The opinion and judgment of the Court of Appeals conflict with applicable local decisions on an important question of local law, *i.e.*, the correct basis for compensation for breach of subcontract, and are contrary to the following controlling Washington State Supreme Court decisions: (Only the remedies for partial breach of contract can apply) *Fry v. Grangers' Warehouse Co.*, 131 Wash. 497, 500, 230 Pac. 423, 424; *Bankers Trust Co. v. Am. Surety Co.*, 112 Wash. 172, 178, 191 Pac. 845,

848; *Mallory v. Olympia*, 83 Wash. 499, 503, 145 Pac. 627, 629; *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 12, 188 Pac. 792, 796; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 145, 154 Pac. 123, 125; (recovery on either implied or *quasi* contract precluded) *Chandler v. Wash. Toll Bridge Authority*, 17 Wn.(2d) 591, 604, 137 P.(2d) 97, 103; (no recovery allowed in *quasi* contract where there is a valid contract between the parties) *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P.(2d) 1034, 1037; *McBride v. Callahan*, 173 Wash. 609, 628, 24 P.(2d) 105, 112; (rescission and recovery not allowed where there is either full or substantial subcontract performance) *Wray v. Young*, 122 Wash. 330, 334, 210 Pac. 794, 796; *Rozzano v. Moore*, 175 Wash. 566, 571, 27 P.(2d) 1096, 1098; *Marrazzo v. Orino*, 194 Wash. 364, 378, 78 P.(2d) 181, 187; (recovery on *quasi* contract precluded where there is no segregation of costs from work done under the subcontract) *Nelson v. Seattle*, 180 Wash. 1, 15, 38 P.(2d) 1034, 1039; *Ross v. Raymer*, 132 Wash. Dec. 131, 140, 201 P.(2d) 129, 135 (decided December 17, 1948); *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81; *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 440, 23 P.(2d) 397, 399; *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 140, 45 P.(2d) 41, 44; *Hole v. Unity Petroleum Corp.*, 15 Wn.(2d) 416, 424, 131 P.(2d) 150, 153; *Lloyd v. American Can Co.*, 128 Wash. 298, 313, 222 Pac. 876, 881; *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 32, 182 Pac. 929, 930; *Strong & MacDonald v. King Co.*, 147 Wash. 678,

685, 267 Pac. 436, 439; (subcontract price is limit of Schaefer's recovery because of his failure to comply with subcontract terms respecting extra compensation for delayed performance) *Goss v. Northern Pac. Hosp. Ass'n*, 50 Wash. 236, 239, 96 Pac. 1078, 1079; *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 412, 125 P.(2d) 275, 281; (Schaefer's failure to minimize damages prevents his recovering) *Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 515, 209 Pac. 690, 691; *Peninsular Sav. & Loan Ass'n. v. Breier Co.*, 137 Wash. 641, 647, 243 Pac. 830, 832; *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 86, 36 P.(2d) 65, 70; *Hoff v. Lester*, 25 Wn.(2d) 86, 95, 168 P.(2d) 409, 414; *Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273, 278, 197 Pac. 39, 41.

2. The opinion and judgment of the Court of Appeals disregarded and therefore likewise so conflicted with provisions of Washington State statutory prohibitions in Rem. Rev. Stat., Secs. 9976-9980; *McGillivray v. Columbia Salmon Co.*, 104 Wash. 623, 626, 177 Pac. 660, 661; *Sussman v. Mentzer*, 193 Wash. 517, 522, 76 P.(2d) 595, 597.

3. The opinion and judgment of the Court of Appeals disregarded the applicable decisions of the Supreme Court of the United States, thereby deciding, by ignoring such decisions, a federal question in a way in conflict with such applicable decisions. *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L. ed. 938; *U. S. v. Blair*, 321 U.S. 730, 88 L.ed. 1039, 1043-4; *Ingle v. Jones*, 2 Wall. (69 U.S.) 1, 17 L.ed. 762.

WHEREFORE, your petitioners Macri respectfully

pray that a writ of certiorari may issue under seal of this United States Supreme Court directed to the United States Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 11707, Continental Casualty Company, a corporation, appellant, v. United States for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, appellee, and Sam Macri, Don Macri and Joe Macri, and A. J. Goerig and Clyde Philp, appellants, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division, be reversed by this Honorable Court, and that your petitioners Macri may have such other and further relief in the premises as this Court may deem proper.

Respectfully submitted,

TOM W. HOLMAN

S. W. BRETHORST

Attorneys of record in this Court for Petitioners Sam Macri, Don Macri and Joe Macri, individuals and co-partners.

In the

Supreme Court of the United States

OCTOBER TERM, 1948

No.....

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner.*

BRIEF IN SUPPORT OF MACRI'S PETITION FOR WRIT OF CERTIORARI

STATEMENT

The trial court judgment was entered May 1, 1947 (R. 112-115). Its unpublished opinion is at R.2208, *et seq.* The opinion of the United States Court of Appeals for the Ninth Circuit (R. 2264-73) was rendered and filed February 11, 1949 (R. 2273). It is reported in 173 F.(2d) 5. Judgment in such appellate court was entered February 11, 1949 (R. 2274). Macri's petition for rehearing was denied April 5, 1949 (R. 2275).

JURISDICTION

Title 28, U. S. Code, Sec. 1254, par. 1, provides the Supreme Court of the United States with jurisdiction to review the opinion and judgment of the Court of Appeals for the Ninth Circuit in this case.

The Court of Appeals' opinion and judgment were filed February 11, 1949 (R. 2274), and Macri's petition for rehearing was denied on April 5, 1949 (R. 2275).

The present petition for writ of certiorari directed to such Court of Appeals is filed timely under Title 28, U. S. Code, Sec. 2101, par. (c) and (e). Issuance of mandate was stayed by the Chief Judge of such Court of Appeals entered April 5, 1949, pending the filing of a petition for writ of certiorari by Continental Casualty Company on or before May 16, 1949, and pending final disposition of such petition in this Supreme Court of the United States.

Petitioners Macri also invoke jurisdiction under Rule 38, par. 5(b) of the Supreme Court of the United States.

The federal district court jurisdiction herein was based solely upon the *Miller Act* (U.S.C.A., Title 40, Secs. 270a and 270b; 49 Stat. 793, 794). Schaefer's amended complaint expressly so stated (R. 2, 10). The district court so found (R. 95, 97, 104). The Court of Appeals passed that finding without mention (R. 2264-2273). Petitioners Macri have, in each such district court and such Court of Appeals, raised directly each of the questions enumerated in the foregoing petition for writ of certiorari.

It is, therefore, respectfully submitted that the nature of this case and the opinions of such district court and such Court of Appeals therein directly bring this case within the aforesaid statutory jurisdictional provisions and within the provisions of Rule 38, par. 5(b), for the several specifications thereof, of this Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioners Macri respectfully here adopt and incorporate by reference herein, as part of this brief, their statement of the case in the preceding petition for writ of certiorari, added to in the course of the following argument as may be otherwise indicated.

SPECIFICATIONS OF ERROR

The errors relied on by these petitioners Macri, made by the Court of Appeals for the Ninth Circuit in affirming the district court, and as such errors were initially made by the district court, are as follows:

1. In affirming, by entirely disregarding in its opinion (R. 2264-2273), the district court's denial of Macri's motion for dismissal at the close of Schaefer's evidence (R. 1374-5).

2. In affirming, by entirely disregarding in its opinion (R. 2264-2273), the district court's denial of Macri's motion for dismissal at the close of all of the evidence (R. 2205-6).

3. In affirming the rejection by the district court of Schaefer's books and records proffered by Schaefer as original entries and not objected to by Macri (R.

2202) (rejected Exs. 52, 53 and 53a to 53h, inc., which Schaefer then withdrew), and resting its affirmation of the district court's judgment upon Pltf. Ex. 63, "* * * a statement of costs prepared by a certified public accountant which showed Schaefer's costs on this project. * * *" (R. 2270), in lieu of such original books and records, such action by both such courts being confiscatory of Macri's inherent rights to have the rejected exhibits available on appeal, and because such Ex. 63 was not the best evidence.

4. In affirming (R. 2268) the district court's finding of fact No. 15 (R. 102-3) and specifically the portion thereof that "* * * there was an implied agreement or *quasi* contract * * *" that Macri would pay Schaefer "* * * the fair and reasonable value of his subcontract under the conditions and with the extra burdens * * *" imposed by Macri, because the same is contrary to the evidence, is contrary to the controlling law of the State of Washington, and particularly is contrary to the terms of the Macri principal contract (Pltf. Ex. 3) and of the Schaefer subcontract (Pltf. Ex. 5).

5. In affirming (R. 2266-7, 2270) the district court's finding of fact No. 16 (R. 103-4) and specifically the finding therein that a reasonable value of $89,498.71, or any other sum except the subcontract price of $34,974.03 less the $32,614.66 paid by Macri thereon to and accepted by Schaefer under job progress and final estimates (Item 12 on Pltf. Ex. 14), and with such balance of $2,359.37 of subcontract payment due being distrained by the U. S. Treasury Department, Internal Revenue Service, notice of levy

of tax lien against Schaefer (R. 1105, ff. 20), because said finding is contrary to the controlling law of the State of Washington, is contrary to any substantial evidence, and to the terms of the Macri principal contract (Pltf. Ex. 3) and the Schaefer subcontract (Pltf. Ex. 5).

6. In affirming (R. 2270) the district court's conclusion of law No. 1 (R. 109-10) that Schaefer should recover judgment against Macri for $56,764.97 with interest and costs, or any other sum except the balance of $2,359.37 subcontract price subject to aforesaid tax levy (R. 105) against Schaefer thereon, because Macri is not legally liable for more than the subcontract price, and because both such conclusion of law No. 1 and such affirmation thereof by the Court of Appeals are contrary to the provisions of the Macri principal contract (Pltf. Ex. 3) and the Schaefer subcontract (Pltf. Ex. 5), and are contrary to the controlling law of the State of Washington.

7. In affirming (R. 2226-7, 2270) the district court's conclusion of law No. 3 (R. 110) as an unconditional judgment against Macri in favor of Continental instead of a judgment conditioned upon Continental being required to pay the $56,764.97 specified therein, despite Continental's disavowal to such Court of Appeals of any claim by it to an unconditional judgment in its favor (Continental reply brief, Ct. App., p. 1; Appellate Court cause No. 11707).

8. In affirming, by disregarding in its opinion (R. 2264-2273), the district court's conclusion of law No. 8 (R. 111) as based on such district court's finding No. 2 (R. 95) and Pltf. Ex. 59, because Schaefer

did not timely file a certificate of assumed trade name in the county and district of the State of Washington in which the public work was performed (R. 140, 179, 180, 670-3), and because said conclusion of law is contrary to Secs. 9976-9980, Rem. Rev. Stat. of Washington, is contrary to the controlling law of the State of Washington, and, also contrary to the applicable decisions of the Supreme Court of the United States.

9. In affirming the failure of the district court to grant Macri's motion to dismiss Schaefer's action for failure to file a certificate of assumed trade name of Concrete Construction Company until after commencement of trial (R. 179) and until after motion to dismiss, for want of such compliance with Secs. 9976-9980, Rem. Rev. Stat. of Washington, had been interposed by Macri (R. 140, 179, 180, 670-673), because such affirmation by the Court of Appeals is contrary to the controlling law of the State of Washington and is contrary to the applicable decisions of the Supreme Court of the United States.

10. In affirming any judgment of the district court for Schaefer where Schaefer had failed to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, pertaining to prerequisite filing of Schaefer's assumed trade name of Concrete Construction Company before bringing this action against Macri, because such affirmation by the Court of Appeals is contrary to the controlling law of the State of Washington and is contrary to the applicable decisions of the Supreme Court of the United States.

11. In affirming the failure of the district court to provide in its judgment (R. 112-115) for any protection to Macri against the U. S. Treasury Department levy on any funds due Schaefer by Macri (Macri Ex. 67) for amounts claimed collected by Schaefer and due the United States (R. 40-46), despite such district court's finding of fact No. 20 (R. 105) that such levy and claim had been made and despite such district court's conclusion of law No. 7 (R. 111), and such court's oral pronouncement that such protection would be given (R. 2227).

12. In affirming any judgment for Schaefer against Macri because the same is against the controlling law of the State of Washington in that the relationship between Macri and Schaefer was contractually based on a written contract and subcontract (Pltf. Exs. 1, 3, 5), which contract and subcontract were both fully performed and were not in any manner abrogated, superseded or rendered nugatory (R. 138-139).

13. In affirming (R. 2268) the district court's oral pronouncement (R. 2222) that Macri is liable for any of Schaefer's claimed overhead costs, specifically as not supported by the Court of Appeals citation (R. 2268) to the Washington case of *Nelson v. City of Seattle*, 180 Wash. 1, 28, 38 P.(2d) 1034, as contrary to the controlling law of the State of Washington, or for Schaefer's claimed loss of profits, on a *quantum meruit* basis or any other basis without complete proof thereof, which was not made by Schaefer.

14. In affirming the district court's failure and

refusal to determine that any sum other than $34,-974.03 gross earnings, as represented by 13,697 cubic yards of concrete placed at $26 per cubic yard as the subcontract price (Pltf. Ex. 5), less all payments thereon by Macri to and accepted by Schaefer of $32,-614.66, is the only amount payable to Schaefer by Macri, subject, however, to such unpaid balance being first freed by Schaefer from U. S. Treasury Department notice of levy (R. 40-46, Macri Ex. 67).

15. In stating in its opinion (R. 2269) that "The Macris rely upon *City and County of San Francisco v. Transbay Construction Co.*, 134 F.(2d) 468 (Cir. 9) * * * (etc. pertaining thereto) * * * ," because such case was not cited or relied upon by Macri or by any other party litigant, either in the briefs or upon oral argument, but instead was injected into oral argument before such Court of Appeals by inquiry of Judge Healy and by direction of Chief Judge Denman that such case be read and that such court be written about such case.

ARGUMENT

Summary of Argument.

1. Only remedies for partial breach of subcontract can apply.

2. Recovery on either implied or *quasi* contract is precluded.

3. Rescission and recovery are not allowed where there is either full or substantial subcontract performance.

4. Recovery on *quasi* contract precluded where there is no segregation of costs from the cost of work done under the subcontract; Schaefer's proof is insufficient for recovery.

5. Subcontract price is the limit of Schaefer's recovery because of his failure to comply with subcontract terms respecting extra compensation for any delayed performance.

6. Schaefer's failure to minimize damage prevents recovery.

7. Schaefer's failure to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, precludes his recovery.

8. Court of Appeals' unwarranted use of its own former opinion with disregard of applicable decisions of the Supreme Court of the United States vitiates its judgment.

9. Court of Appeals' disregard of double liability by judgment entered and without protection against asserted federal tax lien therein is confiscatory and reversible.

1. Only Remedies for Partial Breach of Subcontract Can Apply, Precluding (2) Recovery on Either Implied or *Quasi* Contract, Because (3) Rescission and Recovery Are Not Allowed Where There Is Either Full or Substantial Subcontract Performance.

Schaefer did not elect to abandon and rescind his subcontract. Instead, he completely performed it (R. 523). He currently accepted and cashed the monthly estimate checks (*e.g.*, Macri Exs. 99, 127, 128). Likewise, he ordered payments to his creditors by Macri from his subcontract earnings. Similarly, he invoked, but did not follow through, an arbitration provision of his subcontract (Pltf. Ex. 5, Art. 3, Sec. 9, Macri Ex. 124). *Schaefer did not perform any other contract items than those called for by his subcontract.* Instead, he refused so to do. The district court stated with respect thereto (R. 2214): "* * * He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. * * * And I think his conduct isn't consistent with the meeting of the minds of an express contract that Mr. Macri was to pay for the fair value of his services * * *."

The Court of Appeals' opinion states that "The Washington substantive law of contracts is applicable" (R. 2267), by reason of the underlying doctrine of *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed. 1188, applying 28 U.S.C.A. 725. Fiat to such effect was given the Court of Appeals, Ninth Circuit, through reversal of its opinion, in the case of *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 187-8, 85 L.ed. 114, 117-118, for failure of such Court of Appeals to follow the holding

of the Supreme Court of California. That case cited *West v. American Teleph. & Teleg. Co.*, 311 U.S. 233, 237, 85 L. ed. 139, 144, and the former case from the Ninth Circuit of *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L.ed. 1091, 1097, where that Court of Appeals was sustained for following a state court pronouncement. *Semble, Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 89 L.ed. 101, 103; *King v. Order of United Com. Trav of America*, 333 U.S. 152, 157, 92 L.ed. 601, 611.

The Court of Appeals' opinion in the present case has disregarded the controlling Washington law with a citation to three Washington cases only (R. 2268-9), none of which is applicable as controlling on fundamental merits, as hereinafter discussed. It has disregarded the following positive declarations of the Supreme Court of the State of Washington governing the substantive law of contracts in such State.

(1. *Only remedies for partial breach of subcontract can apply.*) *Chandler v. Wash. Toll Bridge Authority*, 17 Wn. (2d) 596, 604, 137 P.(2d) 97, 103:

> "A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract. 71 C.J. 81, Sec. 42; 17 C.J.S., p. 321; *Schneider v. Allis-Chalmers Mfg. Co.*, 196 Wis. 56, 219 N.W. 370; *Federal Royalty Co. v. Knox*, 114 F.(2d) 78."

Semble: *Fry v. Granger's Warehouse Co.*, 131 Wash. 497, 500, 230 Pac. 423, 424; *Bankers Trust Co. v. Am. Surety Co.*, 112 Wash. 172, 178, 191 Pac. 845, 848; *Mallory v. Olympia*, 83 Wash. 499, 503, 145 Pac.

627, 629; *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 12, 188 Pac. 792, 796; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 145, 154 Pac. 123, 125.

(2. *Recovery on either implied or quasi contract is precluded.*) *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P.(2d) 1034, 1037, states:

> "* * * Of course, recovery on *quantum meruit* is permissible only where the work done is not provided for in the contract. *Strong & MacDonald v. King County*, 147 Wash. 678, 267 Pac. 436. Since the contract provides for the removal of such material, Nelson cannot recover any additional amount on *quantum meruit*."

Semble: *McBride v. Callahan*, 173 Wash. 609, 628, 24 P.(2d) 105, 112.

(3. *Rescission and recovery are not allowed where there is either full or substantial subcontract performance.*) *Rozzano v. Moore*, 175 Wash. 566, 571, 27 P.(2d) 1096, 1098, states:

> "It is not every breach of a contract that entitles the other party thereto to rescind. The breach must be substantial, and, as stated in 6 R.C.L. 926, 'the act failed to be performed must go to the root of the contract.' The text of 13 C.J. 613 is to the same effect. Rescission is to be enforced in equity, and must, under all the circumstances of the particular case, be a just and equitable remedy. The cases of *Distler v. Dabney*, 7 Wash. 431, 35 Pac. 138, 1119; *Thacker Wood & Manufacturing Co. v. Mallory*, 27 Wash. 670, 68 Pac. 199; *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034, and *Main v. Western Loan & Building Co.*, 167 Wash. 1, 8 P.(2d) 281, conform to this doctrine."

Semble: *Marrazzo v. Orino*, 195 Wash. 364, 378, 78 P.(2d) 181, 187; and *Wray v. Young*, 122 Wash, 330, 334, 210 Pac. 794, 796; (see also 12 Am. Jur. Contracts, Sec. 390, Appendix I).

Notwithstanding the foregoing, the Court of Appeals (in the present case, R. 2268) cites *Olwell v. Nye & Nisson Co.*, 26 Wn.(2d) 282, for its authority that Schaefer should recover "in excess of the stipulated contract price for extra work performed in reliance on Macri's statements, which were intended to induce reliance." That *Olwell* case, however, at 26 Wn.(2d) 282, 286-7, holds only that where there was a *quasi* contract (*as distinguished from the existing express subcontract fully performed by Schaefer*), the promisee may waive the tort of the breach and bring an action *in assumpsit* for restitution of resulting losses. Schaefer, differently from Olwell, accepted $32,614.66 of the total contract price of $34,974.03, with the $2,359.37 unpaid balance distrained in Macri's hands by the U. S. Treasury levy for Schaefer's indebtedness to the government, and fully performed the subcontract (R. 78, 104, 124, 105; Macri Ex. 67, R. 40-46).

The Court of Appeals then states (R. 2268) "* * * the measure of Schaefer's recovery against Macris should be the reasonable value of the work plus overhead and profit." It cites the aforesaid *Nelson* case, at page 28 of 180 Wash. 38 P.(2d) 1034, *which does not* at the cited place or elsewhere specify or provide for "overhead" but only for "operating cost per day" and the "going rate on city contracts" of 15% for profit. That was allowed in the

Nelson case only for the time that the subcontractor's performance was extended by Nelson's delay (180 Wash. p. 23), not in lieu of the time within the contract terms. And costs per day for such additional time of delay were proven (180 Wash. p. 28). That was not substituting for the contract performance rate, but was allowing additional compensation for delayed performance. Even that determination of extra compensation for delay has to be read with our above quotation from page 9 of such 180 Wash. case, and our later quotation herein from page 15 of such case. The Court of Appeals' citation, therefore, does not speak the law of Washington by its said citation at page 28 of such 180 Wash. case.

The Washington State decisions above quoted and cited are consistent with the Restatement of the Law of Contracts, Sec. 313, Subdiv. (1) and (2), Sec. 317 thereof, Subdiv. (1), read with Sec. 275(a) and Subdiv. (2) and (7) thereof. See also 12 Am. Jur., Contracts, Sec. 389. There is no judicial departure in the State of Washington from such rules set forth in Restatement of the Law of Contracts. Also, the Washington State holdings above quoted and cited are consistent with holdings of the Supreme Court of the United States in *Klebe v. U.S.*, 263 U.S. 188, 68 L. ed. 244; *Hawkins v. U. S.* (C.C.A. 6) 96 U.S. (6 Otto) 689, 24 L. ed. 607; *Hubbard v. New York Inv. Co.*, 119 U.S. 696, 30 L. ed. 548; *Ingle v. Jones*, 2 Wall. (69 U.S.) 1, 17, 17 L. ed. 762, 764; and see also *Frazier-Davis Const. Co. v. U. S.*, 100 Court Claims 120.

It is stated in *Hawkins v. U. S.* (1887) 96 U.S. 689, 698, 24 L. ed. 607, at 610:

> "Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*."

The above statement is quoted in 2 Fed. Law of Contracts, Sec. 496, page 315. See also cases therein cited. 2. Fed. Law of Contracts, Sec. 487 states:

> "It is familiar principle of law, that, where circumstances occur which authorize a party to rescind a contract, he must elect whether he will rescind or whether he will pursue his remedies under the contract; he cannot do both; and a party may by continuing to treat the contract as in force waive a prior cause for rescission. Thus the right of a party, who contracted to dress stone to be delivered to him by the other party, to rescind because of a delay in the delivery of the stone is waived where he received and dressed a large part of the stone after shipments to him had been resumed."

The quotation above referred to the case of *Graham v. U. S.* (C.C.A. 4) 188 Fed. 651. See also 2 Fed. Law of Contracts, Sec. 492. It is for this reason that the case of *U. S. v. Zara Cont. Co.*, 146 F.(2d) 606 (cited by Court of Appeals, R. 2268) is not in point, for that case, insofar as recovery in *quantum meruit* is concerned, involved a total breach of the contract and the court held (at pp. 609-610) that the plaintiff's claim for extra compensation in addition to the contract was precluded if he had been forced to rely upon the contract.

Similarly, *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940, supports the substantive law of contracts of the State of Washington. The Washington cases above quoted and cited are so entirely in harmony with such *Wyckoff* case that Macri relied principally upon it in appeal to the Court of Appeals. Yet, such court entirely disregarded the *Wyckoff* case. Its holding, entirely harmonious with the Washington State decisions is found at Appendix 3 herein.

4. Recovery on *Quasi* Contract Precluded Where There Is No Segregation of Costs From the Cost of Work Done Under the Subcontract; Schaefer's Proof Is Insufficient for Recovery.

Schaefer made no segregation of any claimed extra costs from the costs otherwise current in performance of the subcontract, *which Schaefer completely performed.* The Washington Supreme Court has declared that there must be such a segregation. It is well stated in the aforesaid case of *Nelson v. Seattle*, 180 Wash. 1, at p. 15, 38 P.(2d) 1034, 1039, where, in discussing the claim of a subcontractor, one Moceri, it is stated:

> "Here, again, we turn to Moceri's own conduct and his methods in handling the work and his accounts. It will be remembered that Moceri's contract called for the laying of sewers and water mains. After Nevada finished with the excavations and subgrading, Moceri went in and dug trenches for the sewers and water mains. After the mains and sewers were laid, there were large quantities of earth that had come from

the trenches which could not be backfilled. It was, of course, necessary for him to remove such surplus earth from the streets, in order to lay pavements. It is while removing such surplus earth from the trenches that he claims he did the subgrading for which he now makes claim. Yet he made no attempt to segregate costs, time of men, or time of equipment, put in on the subgrading, from the costs and time of men and equipment put in on fine grading and the removal of trench earth. Furthermore, in his Federal income tax report, he included all such costs as a part of expense of operation under his contract with Nelson. And on top of it all, he never, during the progress of the work (except in an instance when he was paid extra), made to the city, Nelson, or Nevada, any protest as to the condition in which the subgrade was left by Nevada. * * *"

Semble: *Ross v. Raymer*, 132 Wash. Dec. 131, 140, 201 P.(2d) 129, 135; *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 440, 23 P.(2d) 397, 399; *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81; *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 140, 45 P.(2d) 41, 44; *Hole v. Unity Petroleum Corp.*, 15 Wn.(2d) 416, 424, 131 P.(2d) 150, 153; *Lloyd v. American Can Co.*, 128 Wash. 298, 313, 222 Pac. 876, 881; *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 32, 182 Pac. 929, 930; and *Strong & MacDonald v. King Co.*, 147 Wash. 678, 685, 267 Pac. 436, 439.

Also, Schaefer having currently throughout his subcontract performance accepted payments on pro-

gress and final estimates (*e.g.*, Macri Ex. 99, 127, 128, Item 12; Pltf. Ex. 14) is legally presumed to have accepted such payments for full performance of all services (except for the sum of $2,359.37, balance withheld by levy of the U. S. Treasury Department). This is well stated in *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 249, 182 P.(2d) 75, 81:

> "A reading of the cases hereinbefore cited will show that, under the rules announced by this court, the degree of proof required to establish a claim for services under an original contract, be it express or implied, is no different from that necessary to establish a claim for additional and different services. However, in the latter case, where the one performing the service accepts the payments agreed to under the original contract, there is a presumption that he accepts them in full payment for all services. In both cases mentioned, the proof must be of the clearest and most convincing character."

Schaefer's proof is not of the "clearest and most convincing character," as called for by such *Ammerman*, 28 Wn.(2d) case, just quoted from. In fact, there was admittedly no evidence segregating the cost of any additional work. Schaefer furnished no statement for any claimed extras, regardless of whether or not they were ordered by Macri (R. 341, 1452, 1471, 2155). The subcontract itself provided that such statements must be furnished as a prerequisite to payment (Pltf. Ex. 5, Art. 3, Sec. 3).

Schaefer's evidence as to amount of damages, tried by any of the substantive law of contracts of the

State of Washington, was, therefore, speculative and based on insufficient evidence, too uncertain for him to recover herein. *Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 141, 45 P.(2d) 41, 44; *Quigg Construction Co. v. Chelan County*, 108 Wash. 314, 317, 184 Pac. 331, 332 (quoting from *Hawkins v. U. S.*, 96 U.S. 689, 29 L. ed. 607). This is also the holding of this Supreme Court of the United States and of federal courts of appeal. *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 164, 67 L. ed. 183, 188; *Jack v. Armour & Co.* (C.C.A. 8) 291 Fed. 741, 745.

The district court's judgment amount was based on Schaefer's proffered proof, Pltf. Ex. 63 (an accountant's tabulation instead of original books and records, permeated with the accountant's own ideas as to overhead and profit). The judgment was at least 7½ times the contract price of the related units and at least $25,000 more than the amount for which Schaefer estimated he could do the work by hand. The judgment, therefore, is both speculative and based on conjecture. *Locker v. American Tobacco Co.* (C.C.A. 2) 218 Fed. 447, 450.

The district court's allowance of recovery of more than the subcontract price *when Schaefer had fully performed the subcontract and had taken all estimated payments*, and the Court of Appeals' affirmation thereof, are pointedly in conflict with decisions of at least three other federal courts of appeal: *Farnum v. Kennebec Water Dist.* (C.C.A. 1) 170 Fed. 173, 178 (where the plaintiff contractor was even ejected wrongfully from the contracted

work); *Wolfe v. Prairie Oil & Gas. Co.* (C.C.A. 10) 83 F.(2d) 434, 438 (where contract fully performed, "the contract will limit the amount of recovery"); *United States Potash Co. v. McNutt* (C.C.A. 10) 70 F.(2d) 126, 129-130, 131; and *Foss-Schneider Brewing Co. v. Bullock* (C.C.A. 6) 59 Fed. 83, 90.

Semble: (Supreme Court of U. S.) *Roehm v. Horst*, 170 U.S. 1, 8, 44 L. ed. 953, 956 (Schaefer required either to repudiate subcontract or perform; if performed, subcontract price controls); *U. S. v. Smoot*, 15 Wall. 36, 21 L. ed. 107, 110 (must be impossibility of performance to substitute for contract price of recovery); *Dingley v. Oler*, 117 U.S. 490, 503, 29 L. ed. 984, 988 (must be repudiation by subcontractor, not performance thereof, to recover differently than for contract price).

5. Subcontract Price Is the Limit of Schaefer's Recovery Because of His Failure to Comply With Subcontract Terms Respecting Extra Compensation for Any Delayed Performance.

The Schaefer subcontract (Pltf. Ex. 5, par. 5) specifically provides for delay, neglect or default of Macri, in the following wording:

> "If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, * * * the Subcontractor shall give the Principal Contractor notice in writing within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay."

Schaefer did not give any such written notice (R. 1452, 1589-90, 1595). Nothing but oral complaints

were ever attributed by the district court in Schaefer's favor. "He continued to complain" (R. 2214). The Court of Appeals (R. 2269) and the district court (R. 109) converted this complaining by Schaefer into holding that Macri accepted and acted on oral instead of written notices, as required by the subcontract. The Court of Appeals cites *Ritchie v. State*, 39 Wash. 95, 81 Pac. 79, as the third Washington case deemed by it as directing judgment for Schaefer, notwithstanding the above quoted subcontract provision as to delays. That *Ritchie* case context is actually at page 100 of 39 Wash. and is dictum. The court had already decided the case at page 99 on the ground that the state's employment of an architect could be oral despite legislative act requiring certain building construction contracts to be in writing. Dictum in state decisions do not control federal court decisions. *Bank of California v. American Fruit Growers*, 41 F. Supp. 967, 975.

The substantive law of contracts in the State of Washington is contrary to the Court of Appeals' conclusion. A direct Washington decision in 1905 on the legal effect of a "delay clause" is found in *Goss v. Northern Pac. Hosp. Ass'n.*, 50 Wash. 236, 238-9, 96 Pac. 1078, 1079, Appendix 2. The much more recent Washington case (1942) of *Ericksen v. Edmonds School Dist.* 13 Wn.(2d) 398, 409-410, 125 P. (2d) 275, 280, reaffirms the *Goss* case. It cites controlling cases of the Supreme Court of the United States in support of the following proposition:

> "Where, however, the contract expressly precludes the recovery of damages by the contractor

for delay caused by the default of the owner, that provision will be given full effect. *Wells Brothers Co. v. United States*, 254 U.S. 83, 65 L. ed. 148, 41 S. Ct. 34; *Wood v. United States*, 258 U.S. 120, 66 L. ed. 495, 42 S. Ct. 209; *Orlando v. Murphy* (C.C.A. 5) 84 F.(2d) 531, writ of certiorari denied, 299 U.S. 580, 81 L. ed. 427, 57 S. Ct. 45; *Merchants' Loan & Trust Co. v. United States*, 40 Ct. Cl. 117; *Poole Engineering & Machine Co. v. United States*, 57 Ct. Cl. 232, 63 Ct. Cl. 234; *John N. Knauff Co., Inc. v. United States*, 78 Ct. Cl. 423; * * *." (And many cases from sundry state courts of last resort)

"The specific provision here in question states positively that the contractor shall not be entitled to any claim for damages on account of hindrances or delays *from any cause whatsoever.* This statement is then given further emphasis, in the contract by a stipulation that, if such hindrances or delays are occasioned by any act or omission on the part of the owner himself, additional time for the completion of the work will be allowed, provided always that the contractor shall have given notice in writing of the cause of the hindrance or delay alleged to be the result of the owner's conduct. Appellant, in this instance, did not give the notice entitling him even to an extension of time. But wholly aside from his failure in that respect, he was in any event precluded by the express terms of his contract from maintaining an action for damages resulting from hindrances and delays.

"The law in this state upon the subject under consideration was definitely established many years ago in the case of *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078. * * *"

6. Schaefer's Failure to Minimize His Damage Prevents Recovery.

Even breach by Macri of Schaefer's subcontract as found by the district court (R. 102) and affirmed by the Court of Appeals (R. 2268), though not conceded by Macri, still imposes on Schaefer the duty to minimize damages under Washington State substantive law of contracts. This Schaefer did not do.

As stated in the foregoing Macri petition, if Schaefer had performed all bid items for all of the principal contract items related to his subcontract performance bid items, it would have cost less than 1/7th of the amount of his judgment. By such an expenditure, for which he would have been paid under his subcontract (Ptlf. Ex. 5), and the principal contract (Pltf. Ex. 1, 3), Schaefer could have completely escaped damage. On the basis of his own cost estimate (R. 2122) he could have done all excavations by hand and still saved $25,000 in his asserted cost of performance. The district court specifically declared that "he specifically refused to take over the fine grading and excavating when Mr. Macri * * * offered to turn it over to him" (R. 2214). Schaefer's failure to minimize damages under the Washington decisions precludes recovery.

Peninsular Sav. & Loan Ass'n. v. Breier Co., 137 Wash. 614, 647, 243 Pac. 830, 832, states:

> "It is the duty of every person, who suffers a wrong at the hands of another, to make a reasonable effort to mitigate his damages; and in this instance it was the duty of the respondent, after it learned that the appellant would not carry out the contract of lease, to make a reason-

able effort to put the premises to some other beneficial use.* * *"

Semble: *Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 515, 209 Pac. 690, 691; *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 86, 36 P.(2d) 65, 70; *Hoff v. Lester*, 25 Wn.(2d) 86, 95, 168 P.(2d) 409, 414.

Cannon v. Oregon Moline Plow Co., 115 Wash. 273, 278-9, 197 Pac. 39, 41, states:

"There is another principle which applies also respecting the recovery of such special damages, and that is, that the complaining party must have done everything in his power to make the damages as little as possible. * * *"

7. Schaefer's Failure to Comply With Secs. 9976-9980, Rem. Rev. Stat. of Washington, Precludes His Recovery.

Secs. 9976-9980, Rem. Rev. Stat. of Washington, prescribe the method under which a person legally may operate and sue in the State of Washington under an assumed trade name. Schaefer entered the subcontract (Pltf. Ex. 5), performed all work thereunder and brought this suit as use plaintiff all under the assumed trade name of Concrete Construction Co.

Sec. 9980, Rem. Rev. Stat. of Washington, pertaining to suit, provides:

"No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as pro-

vided for in section 9976, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

Schaefer's right to prosecute the action because of failure to comply therewith was challenged by Macri at trial as legally unwarranted (R. 140, 179, 180, 670-673). The district court sustained Schaefer and entered its conclusion of law No. 8 accordingly (R. 111). The Court of Appeals affirmed by disregarding (R. 2264-2273) this error asserted by Macri (R. 140, 2264). The Supreme Court of the United States has declared that a statutory provision which would bar action in a state court will bar such an action in a federal court. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 89 L. ed. 2079, 2087, the court states:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. * * *."

In discussing the Rules of Decisions Act (28 U.S. C.A., Sec. 725; 8 F.C.A., Title 28, Sec. 725), the Supreme Court in *King v. Order of United Com. Travelers*, 333 U.S. 153, 157, 92 L. ed. 608, 611, states:

> "The ideal aimed at by the Act is, of course, uniformity of decision within each state. So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit, and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one

of the parties to choose whether the case is tried in a federal or a state court."

Semble: (in federal district courts), *Mayflower Stockholders Protective Committee v. Mayflower Hotel Corp.* (D.C.D.C., 1947) 73 F. Supp. 721; *Eagle Star Insurance Co. v. Bean* (D.C., E.D.W.) 134 F.(2d) 755, 757.

The Supreme Court of Washington has declared that failure to comply with Secs. 9976-9980, Rem. Rev. Stat. of Washington, is a bar to suit. *Sussman v. Mentzer*, 193 Wash. 517, 522, 76 P.(2d) 595, 597, states:

> "* * * Section 9980 (P.C. Sec. 4360), provides that no person conducting business under an assumed name shall be entitled to maintain a suit in any court of this state without alleging or proving that the certificate required by the act has been filed. Certainly, the certificate offered and received in evidence is not in accord with the allegations of paragraph one of appellant's complaint."

8. Court of Appeals' Unwarranted Use of Its Own Former Opinion With Disregard of Applicable Decisions of the Supreme Court of the United States Vitiates Its Judgment.

The Court of Appeals' opinion (R. 2269) states:

> "The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468 (Cir. 9). * * *"

A major portion of its opinion is then devoted to distinguishing that case from the present one (R. 2269-70). The above quoted statement is in error, which cannot be shown to the Supreme Court without refer-

ence to the briefs filed before argument in the Court of Appeals, and they are not part of the record available to petitioners Macri to be certified at their instance from such court. We can, therefore, only produce in the appendix in this brief an exact quotation from pages 4 and 5 of Macri's printed petition for rehearing (Appendix 4). We do respectfully request this Supreme Court to regard the same notwithstanding the limit in its rules as to record to be certified to it, because it contains an exact statement of what did occur.

In that connection it is to be noted that Continental, in its brief in support of its present petition for writ of certiorari, at p. 39, quotes from such *City and County of San Francisco* case. This is the first time it has appeared in any brief in this action. That quoted portion of such case is a part which the Court of Appeals did not discuss in the present opinion.

The applicable opinion to control against Schaefer, and the one consistently relied on by Macri, is *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 70 L. ed. 938, (Appendix 3). It has abundant support: *U. S. v. Blair*, 321 U.S. 730, 88 L. ed. 1039, 1043; *U. S. v. Callahan Walker Construction Co.*, 317 U.S. 56, 61, 87 L. ed. 49 53. The Court of Appeals has disregarded these and many other supporting opinions of the Supreme Court of the United States. It has thereby decided a federal question, contrary to its own former decision confirmed by *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L. ed. 1091, 1097, and has thereby now decided a federal question also, in a way which is in conflict with the applicable decisions of the Supreme Court of the United States.

9. Court of Appeals' Disregard of Double Liability by Judgment Entered and Without Protection Against Asserted Federal Tax Lien Therein, Is Confiscatory and Reversible.

It goes, almost without saying, that where the district court declared that protection would be given against the federal tax lien for Schaefer's indebtedness to the government, and provided in its finding and conclusion of law with respect thereto (set forth in Assignment of Error No. 11 above), and where the Court of Appeals affirms the same without change, that Macri is placed in jeopardy by the terms of the very levy itself (R. 40-46). It is equally confiscatory of Macri's property interests as a party litigant for the Court of Appeals to allow the judgment as entered by the district court to remain unaltered, where it provides not only for a $56,764.97 judgment in favor of Schaefer, but an unconditional judgment for $56,764.97 additional in favor of Continental, and this despite the fact that Continental in its reply brief disavowed to the Court of Appeals any claim by it to an unconditional judgment (Assignment of Error No. 7).

CONCLUSION

It is respectfully submitted that the Court of Appeals, Ninth Circuit, has turned its back on the pronouncements to it in 1940 by the decision of the Supreme Court of the United States in *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 187-8, 85 L. ed. 114-118, and in 1936 in *Tipton v. Atchison T. & S. R. Co.*, 298 U.S. 141, 151, 80 L. ed. 1091, 1097. The opinion and judgment are

contrary to other similar federal pronouncements we have cited. They are also contrary to the substantive law of contracts as declared by the Supreme Court of the State of Washington.

In connection therewith, it is here further respectfully submitted that the only "labor and material in the prosecution of the work provided in such contract" (as dictated by the very wording of U.S.C.A. Title 40, Sec. 270b, 49 Stat. 793, 794) and the only "balance *thereof* unpaid" (id.) is the $2,359.37 balance of subcontract price, which stands distrained in Macri's hands by U. S. Treasury Department, Internal Revenue Service, notice of levy of tax lien against Schaefer (R. 105, ff.20). Except for this balance there could be no possible jurisdiction for this action.

In conclusion, it is therefore respectfully submitted that this case calls for exercise by the Supreme Court of the United States of its supervisory powers, that writ of certiorari should be granted as prayed, and that thereafter the opinion and judgments of the Court of Appeals, Ninth Circuit, should be reviewed, reversed and the recovery limited to aforesaid $2,359.37 when, and only when, freed from the federal asserted tax lien.

Respectfully submitted,

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S. W. BRETHORST
Attorneys of Record in this court for Petitioners Sam Macri, Don Macri and Joe Macri, individuals and co-partners.

APPENDIX

1. 12 Am. Jur., Contracts, Sec. 390, states as follows:

> "Waiver of Total Breach; Election to Continue Performance.—The right to refuse to perform further or to accept further performance and to maintain immediately an action for damages because of a material or total breach may be waived, and the injured party may accept or insist on performance after such breach of the contract. Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed depriving him of a right of action for the breach which has already atken place, but depriving hi mof any excuse for ceasing performance on his own part. *And under ordinary circumstances, where there is an existing actual breach of contract, of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance.*" (Italicized portion added to section by pocket supplement)

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2. *Goss v. Northern Pac. Hospital Ass'n.*, 50 Wash. 236, 238, 96 Pac. 1078, 1079:

> "The trial judge ruled as he did on the principal question because of the clause in the con-

tract above quoted. He held that since the parties had contracted that for any delay caused the appellant by the 'act, neglect, delay or default . . . of any other contractor,' additional time should be given him for the completion of the work, that this marked the extent of appellant's remedy for such act or default.

"It seems to us that this conclusion is sound. For conditions which arise in the execution of a contract and for which the contract itself makes no provision, the courts are at liberty to apply the ordinary legal remedies when these conditions become a subject of controversy between the contractors; but where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion. So in this case, since the parties foresaw that the appellant might be delayed in the execution of his part of the work by the failure of the party having the contract for the plumbing and heating plant to perform its work on time, and provided in the contract that the remedy therefor should be an extension of time on his part to perform the work, the presumption arises that this was intended to measure the rights of the contractor thereunder. Is there anything in the contract itself, or in the circumstances surrounding it, that precludes the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary building contract, in which the parties undertook

to put in writing all of their rights and liabilities thereunder. It provided for every condition that could arise in its execution, leaving nothing to surmise or inference, and we think it must be held to contain the entire agreement.

"This question was passed upon in the case *Haydnville Min. & Mfg. Co. v. Art Institute*, 39 Fed. 484, where the rule was announced in accordance with the conclusion we have reached, and in the cases of *Nelson v. Pickwick Associated Co.*, 30 Ill. App. 333, and *Genovese v. Third Ave. R. Co.*, 13 App. Div. 412, 43 N.Y. Supp. 8, where a contrary conclusion was announced. For the reason stated, however, we feel constrained to follow the doctrine of the Federal case."

3. *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940:

"The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (*United States v. Smith*, 94 U.S. 214, 24 L. ed. 115; *United States v. Mueller*, 113 U.S. 153, 28 L. ed. 946, 5 Sup. Ct. Rep. 380; *Ripley v. United States*, 223 U.S. 695, 56 L. ed. 614, 32 Sup. Ct. 352); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

"The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government's delay. After completing performance it brought this suit declaring on the original contract.

"The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie*

County Natural Gas & Fuel Co. v. Carroll (1911) A.C. 105—P.C. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job.

"It is argued that the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable (compare *United States v. Smith*, 94 U.S. 214, 219, 24 L. ed. 115, 116), and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error."

4. Reproduction from Macri petition for rehearing, p. 4:

"It is respectfully submitted that between time of argument before this court on October 19, 1948, and time of filing opinion, February 11, 1949, the Honorable Judges of this court have been unintentionally drawn away from the issues as they were presented. The following statement from the filed opinion shows a decided warping:

" 'The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. (2d) 468 (Cir. 9). * * *'."

The fact is that His Honor Judge Healy, near the end of concluding argument by Mr. Holman, for the Macris, asked, in substance, what is to be said about the applicability of the above-mentioned case; that Mr. Holman stated frankly he was unfamiliar with that case, and that none of the parties litigant had cited it in their briefs or in argument to the court; that thereupon His Honor Judge Denman suggested that Mr. Holman read that case and write the court after doing so. That not only was done by Mr. Holman, but all parties litigant wrote the court specifically about that case.

> "It is, therefore, manifestly unfair to have the filed opinion so state the Macris' position. That statement is not supported by the briefs or by oral argument. In fact, our position is definitely based on *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 46 Sup. Ct. 503, 70 L. ed. 938, as cited and discussed in the Macris' opening brief, pp. 49-51, 52, App. III, reply brief pp. 5, 12. The court, notwithstanding this, has not even mentioned that prime case, nor has the court cited and discussed any Washington authorities contrary to the holding of the above *Wyckoff* case."